Date: 20080925

Docket: T-838-07

Citation: 2008 FC 1080

Ottawa, Ontario, September 25, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

L.G. CALLAGHAN IN HIS CAPACITY AS OFFICIAL AGENT FOR ROBERT CAMPBELL AND DAVID PALLET IN HIS CAPACITY AS OFFICIAL AGENT FOR DAN MAILER

Applicants

and

THE CHIEF ELECTORAL OFFICER OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an appeal pursuant to rule 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules) from the order of a prothonotary, dated July 23rd, 2008, dismissing the applicants' motion seeking leave to file additional affidavits in the herein proceeding (the impugned order).

The herein proceeding

[2] Both applicants, Callaghan and Pallet, act as official agents for local candidates of the Conservative Party of Canada (the Party) who participated in the 39th general election of January 2006. The Chief Electoral Officer of Canada, the named respondent in the herein proceeding, is the head of Elections Canada, an independent body set up by Parliament.

[3] The *Canada Elections Act*, S.C. 2000, c. 9, (the Elections Act) is a complex piece of legislation comprising over 550 sections. One of the respondent's tasks is to review the financial returns of candidates and political parties that participated in an election and to authorize the reimbursement of allowable expenses to eligible candidates and parties in accordance with the requirements of the Elections Act.

[4] If a candidate is elected, or receives at least 10% of the valid votes cast in his or her electoral district, sections 464 and 465 of the Elections Act provide that the candidate is entitled to receive a reimbursement of 60% of the actual paid election expenses to a maximum of 60% of the election expenses limit. All reimbursements made under the Elections Act come from public funds and are paid by the Receiver General to the official agent of the candidate on receipt of the certificate provided by the respondent.

[5] Subject to section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA), the Federal Court has exclusive original jurisdiction to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any "federal board,

commission or other tribunal" acting under powers provided by an Act of Parliament (sections 2 and 18 of the FCA).

[6] This supervisory role of the Court extends beyond formal decisions. It contemplates the examination of the legality of a diverse range of administrative actions, such as those that have been taken by the respondent purportedly under the Elections Act (*Rae v. Canada (Chief Electoral Officer)*, [2008] F.C.J. No. 305 (QL) at para.13, 2008 FC 246).

[7] In the case at bar, what has led to the present judicial review proceeding is the purported "decision" of the respondent to exclude what is referred to as the "regional media buy" (RMB) expenses claimed by a number of the Party's candidates, including the named applicants.

[8] The Callaghan return showed total "Election Expenses" in the amount of $41,775.58, including a "Radio/TV Advertising" expense of $3,947.07 for which the supplier was the Conservative Fund of Canada (the Fund). The Pallet return showed total "Elections Expenses" in the amount of $63,819.14, including a "Radio/TV Advertising" expense of $9,999.15 for which the supplier was also the Fund.

[9] By separate but almost identical form letters dated April 23, 2007, the applicants were both advised that their respective "2005-2006 Candidate share of the media advertisement" would be excluded from the amount that the respondent would certify to the Receiver General of Canada on the ground that the respondent was "not satisfied that the documentation submitted established the

claimed election expense", thereby removing same for the purposes of the calculation of the candidates' reimbursement under section 465 of the Elections Act (the decisions under review).

[10] On May 11, 2007, the applicants (together with other official agents for the Party who are no longer parties to the proceeding) brought this application, the herein proceeding, which seeks conclusions cumulatively in *certiorari* and in *mandamus*:

a. to declare invalid and unlawful, and setting aside the decisions under review; and

b. to force the respondent to fulfill his statutory duties under the Act and to provide certificates to the Receiver General of Canada which will now include the claimed RMB expenses, pursuant to section 465 of the Elections Act.

[11] As provided by rule 317 of the Rules, the applicants requested a certified copy of all documents related to the matter in issue in their notice of application.

[12] On June 21, 2007, the respondent transmitted a certified copy of original material relating to the Elections Act, while objecting to the disclosure of certain information pursuant to rule 318(2) of the Rules submitted as "being solicitor-client privileged documents and portions of other documents containing information that has been redacted as not being relevant to the issue".

[13] By order of Justice Shore dated August 28, 2007, the applicants were ordered to serve and file their affidavit materials by October 31, 2007, or at such other time as the parties may agree to in

writing. By agreement of the parties, the applicants served and filed their supporting affidavits on November 14, 2007.

[14] The applicants filed the affidavits of Ann O'Grady and Geoff Donald, both dated October 31, 2007. Both of these individuals filed their affidavits in their capacities as officials of the Party or the Fund. The applicants also filed the affidavit of Kenneth Brownridge, who was the official agent for another candidate in British Columbia.

[15] At that time, for whatever reason, the two applicants did not file affidavits themselves in support of their application.

[16] In response, the respondent filed the affidavit of Janice Vézina dated January 14, 2008. Ms. Vézina is the Associate Deputy Chief Electoral Officer, Political Financing, and Chief Financial Officer in the Office of the Chief Electoral Officer of Canada (Elections Canada).

[17] On April 29, 2008, Chief Justice Lutfy ordered these proceedings to continue as a specially managed proceeding and appointed Madam Tabib, Prothonotary, as "Case Management Judge of this matter" (the Prothonotary).

[18] Cross-examinations of the respective parties' affiants were conducted in May and June 2008 and have all been completed.

[19] As ordered by the Prothonotary, on September 8, 2008, the applicants served and filed their applicants' record in the herein proceeding.

Leave necessary for filing of additional evidence

[20] Pursuant to rule 84(2) of the Rules, a party who has cross-examined the deponent of an affidavit filed in an application (or a motion) may not subsequently file an additional affidavit, except with the consent of the other parties or with leave of the Court.

[21] Moreover, pursuant to rule 312 of the Rules, a party may not file additional affidavits to those provided for in rules 306 and 307, conduct cross-examinations on affidavits additional to those provided for in rule 308, or file a supplementary record, unless leave is obtained from the Court.

[22] Applications for judicial review are summary proceedings that should be determined without undue delay. Accordingly, the discretion of the Court to permit the filing of additional affidavits should be exercised with great circumspection (*Mazhero v. Canada (Industrial Relations Board*), 2002 FCA 295, [2002] F.C.J. No.1112 (QL)).

[23] The general test for filing of additional evidence is whether this evidence will serve the interests of justice, assist the Court and not seriously prejudice the other side (*Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 23 C.P.R. (4th) 5 at para. 8, 2002 FCA 503) (*Atlantic*).

[24] Further, a party should not be allowed to "split its case" and must put its best case forward at the first opportunity. Accordingly, the supplementary material must not deal with evidence that could have been made available at the time the initial affidavits were filed, unless its relevance could not have been anticipated at that time (*Atlantic* at para. 9; *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2007] 2 F.C.R. 371 at paras. 21-22, 2006 FC 984; *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 681 (QL) at paras. 11-23, 2007 FC 506).

[25] However, there are particular situations where the fourth requirement mentioned above has been applied with some flexibility (*Robert Mondavi Winery v. Spagnol's Wine & Beer Making Supplies Ltd.*, [2001] F.C.J. No. 1412, at paras. 10-17 and 18; *Tint King of California Inc. v. Canada (Registrar of Trade-Marks)*, [2006] F.C.J. No. 1808 (QL) at paras. 22 and 23, 2006 FC 1440).

[26] To sum up, the Court possesses vast discretion to allow a party to file additional material. Such discretion is incompatible with a mechanical application of any set test or formula, whether threefold or fourfold. The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary and will be fact-specific, there may be other factors in any given case.

[27] Thus, it is fair to say that each case will involve a different weighing depending on the individual circumstances before the decision maker (*Solvay Pharma Inc. v. Apotex Inc.*, [2007] F.C.J. No.1190 (QL) at para. 12, 2007 FC 913). Overall, in exercising its discretion, the Court must always have in mind the general principle mentioned at rule 3 of the Rules that "[t]hese Rules shall

be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits".

The impugned order

[28] On June 9, 2008, the applicants served and filed a motion under rule 312 of the Rules to be authorized to file additional affidavits, which has been opposed by the respondent.

[29] On July 23, 2008, the Prothonotary dismissed the applicants' motion and ordered the applicants to serve and file their application record in these proceedings no later than August 29, 2008.

[30] In dismissing the applicants' motion for leave to file additional affidavits, the Prothonotary mentioned a number of reasons in the impugned order:

- First, she found that the proposed evidence, although relevant, was neither "central" nor "crucial" to the determination of the application for judicial review.
- Second, she found that the applicants could or should have anticipated the need or relevance of the proposed evidence at the time they filed their initial evidence.
- Third, she also found that allowing the applicants to file additional affidavits would allow them to split their case on one of the significant issues in the proceeding, and would accordingly be prejudicial to the respondent.

[31] On August 28, 2008, the time within which the applicants may serve and file their applicants' record was extended by the Prothonotary to September 8, 2008, and the time within which the respondent may serve and file their respondent's record was extended to October 21, 2008.

Appeal *de novo*

[32] This appeal was heard on September 9, 2008.

[33] Having considered the applicable test governing appeals from a prothonotary's discretionary decision (*Canada v. Aqua-Gem Investments Ltd*., [1993] 2 F.C. 425, [1993] F.C.J. No.103 (QL), as reformulated in *Merck & Co., Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459, [2003] F.C.J. No.1925 (QL) (*Merck*)), the applicants are entitled to a *de novo* hearing since the issues raised in the appeal are vital to the final issue of the case and, in any event, the impugned decision is based upon misapplied principles of law and upon misapprehended facts.

[34] As it has been indicated by the Court of Appeal in *Merck* at para. 23: "One should not […] come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain alert that a vital question not be reviewed *de novo* merely because of a natural propensity to defer to prothonotaries in procedural matters." In this regard, "[t]he emphasis is put on the subject of the orders, not on their effect" (*Merck* at para. 18).

[35] Evidence is relevant to an application for judicial review if it may affect the decision the Court will make. The relevance is determined by reference to the grounds of review set out in the originating notice of application.

[36] The main subject of dispute between the parties, which can only be resolved by the Judge who shall decide on the merits of the application, pertains to the exact nature and scope of the legal "duties" or "powers" vested or conferred by the Elections Act on the respondent:

- Did the respondent fail to carry out any such duties or otherwise exceed any such powers in excluding the claimed RMB expenses?

[37] The Elections Act contains no privative clause or statutory right of appeal. Before me, counsel have agreed that the standard of correctness applies to issues related to the interpretation of sections 407 and 465 of the Elections Act (*Stevens v. Conservative Party of Canada,* [2005] F.C.J. No.1890 (QL) at para.19, (2005) 262 D.L.R. (4th) 532 (*Stevens*)).

[38] Pursuant to paragraph 16(*d*) of the Elections Act, the respondent, as "Chief Electoral Officer shall […] exercise the powers and perform the duties and functions that are necessary for the administration of this Act". In this regard, it has been stated by the Federal Court of Appeal that "the duty of the Chief Electoral Officer is, essentially, the mechanical application of the very detailed and meticulously drafted legislative provisions that leave almost nothing to chance and that, in reality, confer very little flexibility and discretion on him" (*Steven,* at para. 19).

[39] In dismissing the applicants' motion, the Prothonotary *inter alia* found that "the evidence the Applicants seek to introduce may be relevant, since it could, under a certain interpretation of section 407 of the *Canada Elections Act*, establish that the purpose of the ads was the direct promotion of the election of the candidates". However, the Prothonotary found that the proposed evidence would not be relevant to "the other alternative form of relief sought", and was not therefore either "central" or "crucial" to the case.

[40] Her reasoning is expressed in the following manner:

> The Respondent submits, however, that *mandamus* is only one of the alternative remedies sought by the Applicants. The Applicants also seek an order reviewing and setting aside the decision of the Chief Electoral Officer to deny the expenses. Under this type of remedy, the Court would not be called upon to determine, on the basis of evidence led before it, whether the Applicants' campaign expenses should be certified or not. Rather, the Court's role would be limited to reviewing the legality of the decision, including whether the Chief Electoral Officer applied the correct legal test when it decided not to certify the expenses. If the Chief Electoral Officer applied the wrong test, the matter would be returned to the Chief Electoral Officer for re-determination in accordance with the appropriate test, at which point the evidence now sought to be adduced by the Applicants could be adduced and considered by the Chief Electoral Officer.
>
> Taking this into consideration, it appears to me that while the evidence proposed by the Applicants may be relevant to one of the forms of relief sought in the application, it would not be relevant to the other alternative form of relief sought. <u>It is therefore not, as the Applicants submit, either "central" or "crucial" to the determination of this application, to the point where the jurisprudence criteria discussed above should be applied with more flexibility, to avoid a denial of justice</u> [My underlining].

[41] In so doing, the Prothonotary erroneously decided a complex legal issue, vital to the final issue of the case, which exclusively lies with the Judge on the merits who has sole jurisdiction to determine the appropriate remedy.

[42] First, the Prothonotary wrongly assumed "that *mandamus* is only one of the alternative remedies sought by the Applicants", which clearly is not the case here. The remedies *certiorari* and *mandamus* mentioned by the applicants in their notice of application are cumulative. On the merits, the applicants will argue that they have complied with the requirements of the Elections Act and that they have met all of the conditions for the reimbursement of the claimed RMB expenses. As a result, the applicants will be pressing the Court to quash the decisions under review and order the respondent to issue new certificates to the Receiver General of Canada which will include the sum of $3,947.07 from the Callaghan return and the sum of $9,999.15 from the Pallet return.

[43] Second, the Prothonotary's erroneous analysis of the issue of relevance led her to deny leave to the applicants to file additional reply evidence crucial to the issue of remedies, on the erroneous assumption that they would have the opportunity to directly present this additional evidence to the respondent. Such an assumption is derived from the Prothonotary's gratuitous assumption that if the applicants are successful, the decisions under review will simply be set aside and the matter will be referred back for re-determination by the respondent.

[44] Third, the distinction made by the Prothonotary is purely artificial, as the proposed additional evidence is likely to be relevant to the determination of some central issues in dispute.

[45] On the merits, this Court will be asked by the parties: 1) to interpret the notion of "election expenses" and determine what constitutes candidate advertising as opposed to party advertising; 2)

to determine whether or not the RMB expenses of the applicants were incurred by them; and, 3) to determine the relevant factors in assessing whether the RMB expenses of the applicants are valid under section 407 of the Elections Act.

[46] Some of these determinations will not only require a careful examination of the facts which have led to the decisions under review, but also of the factors used by the respondent to exclude the claimed RMB expenses. Notably at issue is the applicants' alleged compliance with the legal requirements of the Elections Act.

[47] The respondent has taken the position, both before me and the Prothonotary, that the real issue in this judicial review application is whether or not the RMB expenses were actually incurred by the candidates who claimed them in their electoral campaign returns and, if so, whether they were reported at the commercial value as required by the Elections Act. It is submitted by the respondent that these issues are not determined by the advertising content. While the advertising content was taken into account by the respondent, it is submitted by the respondent that "the central legal issue" in this case is whether or not the advertising expense was in fact "incurred" by the candidates who claimed it.

[48] The difficulty with the respondent's position is that it invites the Court, in an interlocutory matter, to re-define the legal issues which are the object of the proceeding prior to any hearing on the merits of the case. Such a task should be performed by the Judge who will have to decide the

merits of the application. In this case, the interests of justice certainly include the Court's interest in having the totality of all relevant evidence before it.

[49] The Judge on the merits will be better placed to assess and give appropriate weight to the additional evidence once he has resolved the interpretation issues raised by the parties and determined the factors conditioning the exercise of the respondent's duties or powers under the Elections Act with respect to the claimed RMB expenses.

[50] Hearing the appeal *de novo*, I have concluded that the proposed additional evidence could not be anticipated. I have also concluded that the production of a supplementary record will serve the interests of justice and assist the Court, and will not otherwise cause serious prejudice to the respondent.

Additional evidence not anticipated

[51] I have no doubt that the applicants put their best case forward at the first opportunity by serving and filing their original material last year. Unquestionably, the additional evidence the applicants now wish to file with the Court will essentially be in the nature of reply evidence to new and unforeseeable elements raised last spring by Ms. Vézina in her cross-examination and re-examination.

[52] The original material filed by the applicants consists of manuals or candidate handbooks emanating from Elections Canada. When the application is heard on its merits, the applicants will

submit that this evidence clearly establishes that, from 1984 to 2006, the respondent consistently interpreted the notion of “election advertising” by a candidate as including not only advertising that promotes or opposes the election of a candidate, but also advertising that promotes or opposes a registered political party (the old interpretation of section 407 by the respondent).

[53] The applicants will also submit on the merits that the respondent has failed to explain why the interpretation of the expressions “election advertising” and “election expense” was suddenly modified, in March 2007, after the 2006 election, such that “election advertising” by a candidate is now limited to advertising “that promotes or opposes a candidate” (the new interpretation of section 407 by the respondent).

[54] Normally, the reasons for excluding the claimed RMB expenses should be found in the decisions under review themselves or in the documents produced by the respondent under rule 317 of the Rules. Whether or not the respondent, as the decision maker, was obliged to set out his findings of fact and the principal evidence upon which those findings were based in the decisions under review is a matter that will have to be addressed by the parties when the merits of the judicial review application are decided.

[55] That being said, the affidavit of Ms. Vézina, which makes up some 55 pages (excluding the attached documentation), provided detailed explanations after the decisions under review were made, with respect to:

- the role of the Chief Electoral Officer of Canada, as well as central aspects of the financing regime under the Elections Act regarding election expenses. In particular, she noted the distinction under the Elections Act with respect to the treatment of political party and candidate election expenses;
- the review and audit process carried out by Elections Canada for candidates' election campaign returns;
- the circumstances leading to the decision of the respondent not to certify the RMB expenses claimed by a number of the Party's candidates, including the named applicants; and,
- the factors which led the respondent to question whether these expenses were in fact expenses of the respective campaigns, as well the contextual elements included in the information put before the respondent when making the decisions under review.

[56] In her affidavit, Ms. Vézina sets out a number of factors that she said were relevant to the decision of the respondent to exclude the claimed RMB expenses of the applicants. In particular, she referred to, as a "contextual element", the fact that the content of advertisements under the RMB program "did not directly promote the candidates who were claiming the expense." As such, Ms. Vézina specifies that "the ads failed to dispel the doubts that had already been raised as to whether the expenses were truly expenses of the candidates' campaigns".

[57] I am satisfied that the applicants have only learned through the cross-examination and re-examination of Ms. Vézina that the respondent may have allowed a candidate to claim expenses for

ads promoting the party (as opposed to the candidate himself), if it was shown that the candidate believed that promoting the party would have the effect of promoting himself or herself (assuming that all other legal requirements were satisfied by the candidate).

[58] This somewhat more liberal interpretation of section 407 of the Elections Act, which was raised for the first time in May 2008, would call for an assessment by the respondent of the candidate's "subjective intent". It has been referred to by the applicants in their material as the "subjective test".

[59] Whether the respondent applied (or is applying) some subjective test is an issue of fact relevant to the final determination of the herein proceeding. On the merits, the applicants will be arguing to the Court that only the respondent's old interpretation of section 407 of the Elections Act is the correct one. This is their primary position. In this regard, they will submit that the respondent's new interpretation of section 407 is wrong in law, whether it includes or not the subjective test now purportedly applied by the respondent. However, as a fall-back position, if the Court is to conclude that a subjective test is allowed by law, the applicants will argue, in the alternative, that in fact they meet such a test.

[60] In this respect, the additional evidence that the applicants now wish to file essentially goes to establishing that the applicants, in their capacity as official agents to the candidates, were of the view, at the time they agreed to participate in the media buys at issue, that running additional ads in

their riding would directly promote the election of the candidate even though the ads themselves were general party ads.

[61] Therefore, in granting leave to the applicants to file such additional evidence, it cannot be said that the Court would be permitting the applicants to "split their case" as argued by the respondent.

Other factors

[62] This is a case where the interests of justice outweigh any prejudice, real or perceived, raised by the respondent who is the tribunal that rendered the decisions under review.

[63] This is not a patent infringement action or a NOC proceeding where private litigants are arguing competing commercial interests. The public interest is at stake in this proceeding.

[64] Neither is this the usual type of judicial review proceedings involving some departmental action or administrative decision of a tribunal, the legality of which will normally be defended by the Attorney General of Canada.

[65] It must be remembered that the tribunal whose decision or actions are being challenged in a judicial review application is not normally named as respondent. The Attorney General of Canada is not a named party to this proceeding.

[66] The issues raised in the herein proceeding are of public interest, as they involve the exercise by the respondent of non-partisan powers or duties.

[67] It has been stated that "[t] he Chief Electoral Officer is the independent and neutral steward of the integrity of the electoral process" (*Longley v. Canada (Attorney General)*, [2007] O.J. No. 4758 at para. 74, 2007 ONCA 852), and in the words of the Federal Court of Appeal, "the Chief Electoral Officer is, in a sense, the guardian of democracy in Canada and this democracy could be compromised by granting the person on the front line in charge of protecting it powers that are even slightly arbitrary" *(Stevens* at para. 19).

[68] In granting leave to file additional evidence this must not create a situation of procedural unfairness as well as undue delays. This can easily be remedied by including appropriate directions with respect to further cross-examinations, and the opportunity for the respondent to adduce further evidence in reply in the order of the Court granting leave to the applicants to file additional material. Time limits for doing so are relatively short but may be extended by the Prothonotary who may also resolve any remaining procedural issue.

Conclusion

[69] Thus, exercising my discretion *de novo*, I will allow this appeal and set aside the impugned order. Leave to file additional evidence will be granted to the applicants together with appropriate directions with respect to extension of delays and other procedural matters, including the

respondent’s right to file additional evidence and to cross-examine the applicants. Costs should be in favour of the applicants in both instances.

ORDER

THE COURT ORDERS:

1. The applicants' appeal is granted;
2. The Prothonotary's order dated July 23, 2008, denying the applicants' motion for filing additional affidavits, is rescinded;
3. Leave is granted to the applicants to serve and file, within ten days of the present order, their proposed additional affidavits, unless this delay is extended by the Prothonotary;
4. Leave is granted to the respondent to serve and file such responding affidavit(s) as it may deem appropriate, within ten days of the service of the applicants' additional affidavits, unless this delay is extended by the Prothonotary;
5. Conduct of cross-examinations on additional affidavits shall be concluded within ten days of the service of the respondent's additional affidavit(s), unless this delay is extended by the Prothonotary;
6. Any additional order under rule 312 of the Rules, including the fixing of new dates for the filing and serving of additional records in the proceeding, shall be made by the Prothonotary;
7. Costs of this motion in appeal and of the applicants' original motion before the Prothonotary are in favour of the applicants.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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